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No._____

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROBERT B. SUTTON,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

ON APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented to this Honorable Court for review are whether:

I. Did the opinions below deny the Petitioner his constitutional right to confront and examine before the jury witnesses against him (Jean Brown and Jack Clothier) for bias, interest, motive and prejudice when the trial judge prevented confrontation of these witnesses with a Texas State court indictment pending against them?

II. Did the opinions below allow the government to introduce a "box" of contested hearsay documents without any proper foundation, identification or authentication and deny petitioner his right to confront the evidence in his first trial in which he was convicted on one count, where the Government exhibit was not shown to any witness who had control of it, nor any custodian of the records and the Government failed to call key witnesses who had possession of these documents for over one year?

III. Did the trial court in preventing the defendant from informing the jury that he was acquitted of other crimes in the indictment, evidence of which was introduced at both trials and argued to the jury as motive and intent on the remaining counts emasculated the defendant's constitutional protections of collateral estoppel, double jeopardy, confrontation, due process and a fair and impartial jury?

IV. Did the opinions below allow a double standard to be applied in the granting of challenges for cause in the jury selection process, thus increasing the government's pre-emptory

challenges and impairing Defendant's right to his unrestricted right, his pre-emptory challenges, when the trial judge automatically excused for cause jurors with knowledge of the Defendant's prior acquittals, but applied a stricter requirement for jurors with adverse knowledge of Defendant?

V. The opinions below fail to apply the independent evidence test for introduction of co-conspirator statements when the only other independent evidence negated the intent of the only other alleged co-conspirator in violation of petitioner's right to confrontation?

LIST OF INTERESTED PARTIES

Pursuant to Rule 21.1(b) of the Rules of this Honorable Court, Petitioner states that he is the only interested party within the contemplation of the above cited rule.

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PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT

The Petitioner, Robert B. Sutton, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in the case on April 23, 1984.

OPINIONS BELOW

The Tenth Circuit Court of Appeals upheld Petitioner's conviction by opinion dated April 23, 1984. A copy of that opinion is marked "Appendix A" and annexed hereto. On June 4, 1984 the Tenth Circuit denied a timely filed petition for rehearing by a Per Curiam judgment which assigned no written reason therefor. A copy of that Per Curiam is marked "Appendix B" and annexed hereto.

The trial court issued no opinion upon the conviction of the Defendant (United States District Court for the Northern District of Oklahoma, Honorable Judge James O. Ellison, presiding).

STATEMENT OF JURISDICTION OF COURT

Pursuant to 28 USC 1254, appellant seeks to have this Court grant his Petition for Writ of Certiorari and review the decision of the United States Court of Appeals for the Tenth Circuit rendered on April 23, 1984. The decision of the Tenth Circuit became final upon the denial of that Court of a timely filed petition for rehearing June 4, 1984. The jurisdiction of the Circuit Court was based on 28 USC 1291. The Defendant was convicted of Count XVII of the indictment on May 27, 1982 and of Count XVI June 22, 1982. The District Court had original trial jurisdiction of this case pursuant to 18 USC Sec. 3231.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal constitutional provision which will be the

subject of interpretation in this case is the Sixth Amendment to the United States Constitution which reads as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner Sutton, along with two corporations, B.P.M., Ltd. and Scurry Oil Company, was indicted on October 29, 1981, and charged as follows:

1. Sutton, B.P.M., Ltd., and Scurry Oil Company—Counts I-III, 3 violations of Title 18 USC 1961 et seq. (R.I.C.O.)
2. Sutton, B.P.M., Ltd., and Scurry Oil Company—Counts IV-XI, 8 violations of Title 18 USC 1341 (Mail Fraud)
3. Sutton, B.P.M., Ltd., and Scurry Oil Company—Counts XII-XV, 4 violations of Title 18 USC 1343 (Wire Fraud)
4. Sutton—Count XVI, violation of Title USC 1505 (Obstruction of Justice)
5. Sutton—Count XVII, violation of Title 18 USC 371 (Conspiracy to Obstruct Justice)

The principal charges of the indictment concerned allegations that the Petitioner had committed mail and wire fraud

and thereby violated the R.I.C.O. statutes (18 USC 1961 et seq.). The alleged predicate offenses for the R.I.C.O. counts were the mail and wire fraud counts contained in Counts IV through XV.

Count XVI charged a violation of 18 USC 1505 as a result of an alleged phone call by the Defendant, Sutton, to a Mr. Gaylord Simon on December 19, 1978, in which Sutton allegedly counseled, advised and suggested that Simon destroy and conceal certain records of B.P.M.'s crude oil sales and purchases, which were being sought by the Department of Energy in connection with Department of Energy proceedings.

Count XVII charged that Sutton conspired, with persons known and unknown, to obstruct justice by preventing Jack D. Clothier and William H. Lambert from communicating information relative to criminal violations to the F.B.I. and Department of Justice by means of misrepresentation, intimidation, force and threats.

Prior to trial the Defendants filed a motion for a pre-trial hearing regarding co-conspirator statements. The Court granted Defendants' request for a pre-trial "James-Peterson-Stipe" hearing to determine whether the Government had sufficient independent evidence of the conspiracy as alleged in Count XVII to permit the introduction and receipt of co-conspirator's statements at trial and also to determine whether an abuse of the grand jury process had occurred. These hearings were conducted April 1, 2, 5 and 6 of 1982, prior to the commencement of trial on April 20, 1982. After hearing the evidence, the Court ruled that there was a conspiracy between Sutton and Carlos Marcello but not with any other alleged persons. (Pre-trial Hearing on April 6, 1982.)

The Government presented its evidence at trial commencing on April 20, 1982, and concluded its presentation on May 12, 1982. Thereupon, the Defendants, under Rule 29(a) of the Federal Rules of Criminal Procedure, moved for judgment of acquittal. The trial court, on May 13, 1982, entered a Judgment of Acquittal in favor of all Defendants on Counts I through XV but declined to do so on Counts XVI and XVII which involved only Sutton. (TR. I 3141-3144) The Government sought review on an emergency basis in the Tenth Circuit. A divided panel of the Court of Appeals, on May 20, 1982, set aside the District Court's Judgment of Acquittal and directed that all counts of the Indictment be submitted to the jury. Immediately thereafter the Court of Appeal sitting *En Banc* reversed the decision of the panel.

At the recommencement of the trial on May 25, 1982 the trial court instructed the reconvened jury that Counts I through XV of the Indictment had "been otherwise disposed of" and further instructed the jury that they should not consider these charges or speculate in any way as to how the charges were disposed of. The Court further advised the jury that they were to consider only the charges contained in Counts XVI and XVII and "the evidence introduced as it pertains to those charges" without defining or indicating what evidence was to be considered by the jury. (TR I 3226) Thereafter, following two days of deliberation by the jury a verdict of guilty was returned as to Count XVII with the jury being unable to agree on a verdict as to Count XVI.

Thereafter, the re-trial of the appellant on Count XVI was commenced on June 14, 1982 after the Court denied a continuance motion by the Defendant. In the selection of the jury for the re-trial of Count XVI, the Defense moved for a mis-

trial on the basis of the Court's dismissal of jurors who indicated an awareness or knowledge of the disposition by the Trial Court of Counts I through XV of the Indictment, when challenged for cause by the Government, without making further inquiry as to whether with such knowledge the jurors could sit fairly and impartially in judgment of the case, while allowing jurors with confused or adverse information about the Defendant to remain on the panel when challenged for cause by the Defendant. The Petitioner was restricted from introducing any evidence of the disposition of Counts I through XV or his acquittal of the charges of fraud as therein set forth even when he testified at the second trial. The jury returned a verdict of guilty on June 22, 1982.

Judgment was entered on July 1, 1982, and Sutton was sentenced to five (5) years imprisonment of each of Counts XVI and XVII, the sentences to run concurrently.

B. Statement of Facts

1. The First Trial

On June 30, 1978, the Department of Energy (DOE) served a subpoena on a "James Blakely," a Sutton employee (Government 41) which directed Sutton, as president of B.P.M., to produce certain crude oil sales and purchase records by July 10, 1978. (TR I 2509, 2510) No evidence of further enforcement or other proceeding by DOE was introduced. (TR I 1508-2511)

In the summer of 1978, Sutton had purchased a refinery company in Louisiana called Inger Oil Company (Inger). Miss Jean Brown operated both Scurry and Inger for Sutton

until she left sometime in October of 1978. At the time she left, Miss Brown formed her own companies, Creek Terminals and Creek Development, to build an oil reclamation plant close to the Inger refinery. To purchase the land, she used a check she wrote on Inger's account. She had been introtroduced to the other principals in this company by Jack Clothier. Much of the equipment at Inger disappeared and some of it ended up at the Creek Terminal site, provoking a confrontation between Sutton and Jean Brown. (TR I 737, 742, 743-784, 812-817, 2641-2642)

In the fall of 1978, Sutton had most of his records relating to B.P.M., Scurry Oil, Inger and other companies taken to Lafayette, Louisiana to be stored for use by his attorney, Charles Wooten. (TR I 2573) Wooten had retained the services of an accountant, William Johnson, (TR I 2528) to work on the records of B.P.M., Scurry Oil, Inger and other companies to assist him in his representation of Petitioner and his companies. Johnson had various records of Petitioner including B.P.M. and Inger records at his office to work with. (TR I 2532-2534)

Gaylord Sutton was an employee of Sutton at Lafayette, Louisiana who had been hired by Jean Brown to help run Inger. (TR I 2572) Simon testified at trial that he was called by Bob Noland, a B.P.M. employee, and was told to go pick up a box of records at Johnson's office on December 19, 1978. (TR I 2580) He stated that he picked up a box of records and went to LaFonda's Restaurant in Lafayette, Louisiana where he called Petitioner Sutton at the office of Paul McBride, Sutton's attorney at that time. (TR I 2588-2589) Phone records were introduced to show a call from

LaFonda's on December 19, 1978, to the law office of Paul McBride in Tulsa, Oklahoma at 12:01 P.M. Simon testified that Sutton told him on the phone to destroy the box of records that he had, and that he never wanted to talk to him again about it. (TR I 2583)

Simon also testified on cross-examination that on December 19, 1978, he also had a box of Inger records in his possession, which he had gotten from Johnson's office and which he was working on that day with an attorney from Wooten's office. He admitted it was possible that he called Sutton's attorney, Mr. McBride, that day to talk about the deposition in New Orleans set for the next day at which he was to produce Inger records. He also admitted that he had driven to New Orleans that night (the 19th of December) so that he would be there the next morning for the deposition at which he produced the box of Inger records. (TR I 2516-2625)

Simon testified that he never destroyed the box of records he had, but kept them in his closet at home. (TR I 2583) Simon continued to work for Sutton until May of 1979, when he moved to the Houston, Texas area. He testified that he was never contacted by anyone from B.P.M. or Sutton to ask what he had done with the records or whether, in fact, he had destroyed them. (TR I 2626)

Simon further testified that in June of 1979, he gave the box he had to Jack Clothier, a former business associate of Mr. Sutton in Scurry Oil. (TR I 2583) He also stated that in May and June of 1979, Jack Clothier gave him two $10,000.00 checks which he called a loan. (TR I 2627-2628)

Jack Clothier was trading oil in the Houston, Texas area in the Fall of 1979, and doing business with Jean Brown and Simon. At a hotel in Longview, Texas in December of 1979, he offered Jean Brown a part of a blackmail deal against Sutton to blackmail him for records he had obtained. (TR I 766, 767, 2630)

Both Clothier and Jean Brown were indicted by the State of Texas for criminal activity together involving theft of oil which occurred during this period of time, but the trial court would not allow cross-examination of Jean Brown regarding these charges and ruled that no other witnesses could be cross examined about the Texas State Court Indictment in the trial including Jack Clothier. (TR I 708-725)

In January of 1980, the federal prosecutor investigating B.P.M. for DOE violations, Mr. Fishkin, was notified by letter by Sutton's attorneys that Mr. Jack Clothier and his attorney, Mr. William Lambert, who also purported to represent Mr. Simon and Miss Jean Brown, seemed to be in possession of certain records of Sutton's about which they were making thinly veiled blackmail demands upon Mr. Sutton. Mr. Fishkin subpoenaed Mr. Clothier to the Grand Jury in Oklahoma City for February 7, 1980.

On January 24, 1980, Sutton, who had received extortion demands from Jack Clothier for $5,000,000.00, called a Carlos Marcello in New Orleans, Louisiana. Mr. Sutton told him that he was being blackmailed and wanted to talk about it. (Government Exhibit 51 and 52, TR I 2815) Carlos Marcello's phone and office were "tapped" as a result of the "Bri-Lab" investigation.

On January 29, 1980, Mr. Sutton came to the office of Carlos Marcello and told him that he was was being blackmailed and wanted Mr. Marcello's assistance. He stated that Jack Clothier and William Lambert had talked to the F.B.I. and were going to talk to them again on the following Monday. He told Marcello that his lawyers had told the F.B.I. about the blackmail and they hadn't done anything. He said that he wanted Jack Clothier arrested and put in jail on a pending warrant and Lambert picked up and put in jail for D.W.I. Marcello replied that he would check on them. (Government Exhibit 51 and 52) (TR I 2817) (Pre-trial Exhibit 8, April 2, Pg. 83)

On February 1, 1980, Marcello met with Barry Mouton, his lawyer, and told him of Sutton's blackmail problems. He said he wasn't going to do anything for him. He said he had just listened. He had earlier called Mouton on January 30, 1980, and asked if he knew anything about Lambert or Clothier. (April 2, Pre-trial Motion, Exhibit 10, Pg. 84) (All Mouton recordings were not introduced at trial having been suppressed by the trial court.) He also told Mouton that Sutton had a lot of money and indicated that perhaps there could be a way that they could get some of it. (April 2, Pre-trial Motion, Exhibit 12, Pg. 89)

The same afternoon, Marcello was visited by Robert Noland, an employee of Sutton's who did his crude oil trading. With Noland was a Mr. Dick Williams who was described by Marcello as "his man." Mr. Noland told Marcello that he wanted Marcello to try and convince Sutton to turn over the operation of his companies to Noland and Williams, because he, Noland, wanted to take over. Marcello agreed to do this,

but said he would have to get "closer" to Sutton. Marcello told Noland and Williams that he had talked to Sutton and would not get involved with him in his problems with the F.B.I. (TR I 2850)

On February 6, 1980, Marcello, in a phone call with Mouton, told him that he wanted to get Mouton together with Sutton so Mouton (his friend) could get a fat legal fee. (April 2, Pre-trial Motion, Exhibit 18, Pg. 91 & 92)

Despite the fact that the F.B.I. monitored all of Marcello's phone and office conversations during this time and afterwards, no other evidence was ever produced to show that Marcello did or said anything to indicate he intended to or was assisting Sutton to obstruct justice. No evidence was received which showed anyone interfered in any way with Clothier or Lambert in their relations with the F.B.I. at any time, despite the fact that the Defendant was not aware that these conversations had been surreptitiously recorded until after the indictment had been returned in October of 1981.

When Clothier appeared at the Grand Jury on February 7, 1981, he did not produce any box. Both he and Lambert told the Government prosecutor that Simon had some records. They said that Simon was nervous and would be uncooperative, but that they would go talk to him and try and get him to turn over the box of records he had. The Government attorney acceded to this and Clothier and Lambert returned to Louisiana. (TR I 2672-2735)

Later, the Government attorney issued a subpoena to Simon for the box of records. F.B.I. Agent Blount scratched out the name of Simon and wrote in Lambert and picked up

a box of records from Mr. Lambert which was introduced through Mr. Blount as Government Exhibit 53. (TR I 2857-2864) No other witness called by the Government to that point had ever been shown Government Exhibit 53.

Simon testified in Trial that he had not seen the box since he had given it to Clothier in 1979.

Neither Clothier nor Lambert was called by the Government at trial but Mr. Fishkin admitted that Clothier had been brought back to a later Grand Jury and allowed to change his testimony about the box of records he had possessed, because either he or Simon had lied to the Grand Jury about it. (TR I 2672-2735)

2. The Second Trial

At the second trial involving only Count XVI, no evidence was presented as to the conspiracy allegation with regard to Count XVII.

At this trial Miss Brown again testified about preparing a box of records which was sent to Louisiana and about comments Sutton had made about burning his records before turning them over to the authorities. But in this trial she was shown Government Exhibit 53 for identification purposes. She again admitted Clothier had asked her to participate in a blackmail scheme against Sutton.

The Government was also allowed to introduce evidence alleging miscertification of oil by the Defendant and, in fact, argued that this was a "violation of the law," in spite of the Defendant's prior acquittals. The Defense was prohibited from

proving that Sutton and B.P.M. and Scurry Oil had been acquitted of these allegations in the first trial even when Robert Sutton testified in this trial and was cross examined about these prior crimes.

Gaylord Simon was again called and testified to the phone call in which he had allegedly been told to destroy the box of records he had picked up from William Johnson. He was shown Government Exhibit 53 but could not identify this as the box he had received from Johnson. He testified the box he had possessed had B.P.M. written on its sides. (TR II 716-791) Government's Exhibit 53 had no such markings.

The Government also called Jack Clothier in this trial, who identified Government Exhibit 53 as the box he had gotten from Simon. He denied having asked Jean Brown to participate in a blackmail scheme in direct contradiction to her testimony. (TR II 1023-1056)

The Defendant Sutton was called in this trial and testified that he never told Simon to destroy any records. (TR II 1109-1112)

In the second trial the defense did not confront either Jean Brown nor Jack Clothier with their Texas State Court indictments because of the prior rulings by the trial court.

ARGUMENTS OR REASONS FOR GRANTING THE WRIT

There are several compelling reasons why this Honorable Court should issue a Writ of Certiorari in this case (all of which are within the purview of Rule 17). These reasons coin-

cide with the "Questions Presented for Review" found in this petition and are numbered similarly. The opinions below (particularly the Tenth Circuit Court of Appeals decision) completely failed to respond to the constitutional considerations raised by the Petitioner. To leave the Tenth Circuit decision in this case standing intact will put that Circuit in the position of holding contrary to the other Circuits, contrary to the authorities of the Honorable Court and contrary to its own opinions, and results in the denial of Defendant's basic constitutional rights and a fair trial as set out in each of the following sections.

I. THE OPINIONS BELOW DENY THE PETITIONER HIS CONSTITUTIONAL RIGHT TO CONFRONT AND EXAMINE BEFORE THE JURY WITNESS AGAINST HIM (JEAN BROWN AND JACK CLOTHIER) FOR BIAS, INTEREST AND PREJUDICE AGAINST PETITIONER.

The Sixth Amendment of the United States Constitution provides in pertinent part: "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . ." The right to confront and examine for bias, prejudice and interest could not be more basic to our criminal justice system. As *Davis v. Alaska*, 94 S.Ct. 1105 (1979) plainly dictates, it is not a right without a remedy.

> "Petitioner was denied the right of effective cross examination which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' *Brookhart v. Janis*, 384 U.S. 1,3, 86 S.Ct. 1245, 1246, 16 L.Ed.2d 314. *Smith v. Illinois*, 390 U.S. 129, 131, 88 S.Ct. 748, 750, 19 L.Ed.2d 956 (1968)." *Davis*, supra at 1111.

It is the **jury** who must be allowed to judge the response of the witness when directly confronted with **evidence** of bias, interest and prejudice, allowing the jury to draw inferences of bias motive and interest, even where denied by the witness. It is clear from Jean Brown's sworn testimony in a federal grand jury proceeding, that she blames the Defendant for the "charges" (state racketeering charges) pending against her and "Jack Clothier" in Texas (TR I 711)[1] Scurry Oil Company was a Sutton-owned company in which both Jean Brown and Jack Clothier allegedly claimed an interest. In her Grand Jury Testimony, Ms. Brown is obviously stating that **Bob Sutton** and his company, Scurry Oil (co-defendant in this case), were responsible for the criminal acts **she** was charged with in Texas and that she and her associates, with whom she was indicted (including Jack Clothier), didn't know anything about it. Clearly this demonstrates that she asserted that "they" (Robert Sutton and his company, Scurry Oil) got her "mixed up" in it, and that neither she nor Jack Clothier knew anything about it. In effect, her defense to those charges was to "dump" on Bob Sutton, and in connection therewith, protect Jack Clothier. The State Court indictment was obviously relevant to the issue of additional Goverment witnesses' motives to lie,

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[1] MR. LANSDEN: I think it tore out. Here it is starting on page 45 at the bottom of the page.

"Question: Did something happen to Scurry Oil after you left working for Bob Sutton that you heard about?

"Answer: Yes, sir, they went down, they were buying oil inadvertently they claimed got me mixed up with it and it just isn't true. I didn't even know they were hauling oil out of east Texas and turning it in to barge down at Aransas Pass and selling it for crude being purchased in west Texas. West Texas crude is practically all very sour. East Texas crude is all sweet. Then they were carting it around and taking it into Mr. Sutton. He was selling it to somebody else or taking it into his refinery.

"Question: What happened, how did you hear about that?

"Answer: Well, I got indicted along with a bunch of other people that don't know anything about it going back to . . . ."

That's the portion I refer to the Court.

in this case, to protect each other and gain favor with the Government.[2]

The Lower Court decision ignores the fact that the trial Court's ruling prohibited this confrontation in the second trial with both Jean Brown and Jack Clothier. Throughout the first trial, defense counsel repeatedly argued to the Court that the Court's ruling would prevent them from examining the bias, prejudice and interest of witnesses other than Jean Brown. The Court requested the names of specific witnesses

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[2] Obviously, from the face of the Indictment, (Defendant Exhibit 3 & 4), Jean Brown and Jack Clothier had a motive to protect each other's interest. Jean Brown's attempts to do so are apparent from the shading of her admission to the F.B.I. that Clothier had offered her a part of a blackmail deal against Sutton, testifying she didn't believe Clothier was serious. (TR 771) She also denied having any further business dealings with Clothier after she left Sutton's employment in the fall of 1978. (TR 766) However, the scope and particular allegations in the Texas Indictment gave a backdrop for most of these witnesses' actions during the time frame of Counts 16 and 17 of this case.

First, they show a continuing pattern of criminal conduct between these individuals during a period from the summer of 1979, through at least February of 1980. Second, they show a continued pattern of operation under the name "Creek Terminals," which cross examinations of Jean Brown established was set up with the use of Defendant's money through Inger Oil Company, most of whose records had been **vandalized in Crowley by unknown persons.** (TR 742-784, 2576-2578, 2533) Third, the Indictment shows the involvement of John Rakestraw with Jean Brown at page 3, paragraph 7, of defense Exhibit 4. Rakestraw had received forty thousand dollars from Jean Brown shortly after she left Inger Oil and around the same time that the "Inger" records were vandalized in Crowley. (TR I 578-762) Fourth, Gaylord Simon admitted giving a box of records to Jack Clothier in the Houston area in the summer of 1979 and receiving twenty thousand dollars from Clothier and getting in the oil business in that area of Texas and dealing with Clothier in the oil business thereafter. (TR I 2591-2621) Finally, Jean Brown admitted that Clothier told her about the blackmail scheme at a place and time that coincides with paragraph 2 on page 7 of defense Exhibit 4 (TR I 766-769), yet she was very evasive as to whom Clothier got the records from and whether or not he paid Simon for them.

Jean Brown and Clothier were originally set to be tried **before** Sutton on these state charges, yet the case was continued evidently after some contact and agreement was made with State authorities by the United States Attorney's Office (June 10th, Hearing on Motion, Page 6). Assistant United States Attorney Swartz made the statement that two lawyers who were subpoenaed witnesses in the Sutton trial would be representing Clothier and Brown in the Texas State Court proceedings, presumably William Lambert and Paul McBride. **Jack Clothier has yet to be tried on these charges.**

for the record. (TR I 710) Defense counsel responded that they should be entitled to ask Jack Clothier whether he blamed the Defendant for Texas charges pending against him, or whether the fact that he was charged with Jean Brown would motivate him to protect her as well as himself by blaming the Defendant. (TR I 696, 985) Defense counsel urged this again to be sure that the extension of this ruling would be preserved for appeal. (TR I 987)

At both trials, defense counsel desired to ask Jean Brown and Jack Clothier about the Texas charges and whether they received, expected to receive or had hopes of receiving assistance from the United States Government or the Texas authorities as a result of the federal and/or state charges, or whether these charges gave them motive to protect each other and whether Sutton's conviction would benefit them. Both witnesses denied such inducements. In the first trial the Trial Court ruled that defense counsel could only ask whether they had been promised "help by the Government" without examining further the nature of the charges they might expect help with, and what were the nature of those charges. (TR I 689, 691, 708) Therefore, defense counsel was not allowed to examine, in front of the jury, for "what" she blamed the Defendant, or infer **why these charges** gave her motivation to protect other witnesses in this case, or how a conviction in this case of Sutton would assist them in their Texas case defense. If the jury is unaware of exactly what, or how much trouble the witness thinks the Defendant caused her, and how the specific charges would motivate the witness to be biased, how can the jury decide just what and how much motivation the witness would have to be biased and prejudiced against the Defendant? In this particular situation, the balancing of interests between the Defendant's constitutional right to confront

admitted **and sworn bias**, interest and prejudice against him and on the other hand, the protection against revealing other acts or conduct of the Government witness, must be resolved in the Defendant's favor. *Davis v. Alaska*, supra, *U.S. v. Mayer*, 556 F.2d 2145 (5th Cir. 1977), *United States v. Crumley*, 565 F.2d 945 (5th Cir. 1978), *United States v. Groucher*, 532 F.2d 1042 (5th Cir. 1976).

Since the Court's ruling extended not only to the cross examination of Jean Brown, but also to Jack Clothier, (TR I 696, 708, 1454), counsel was prevented from confronting him with this issue at the subsequent retrial of Count XV when he testified. (See *Abzill v. Pogue*, 534 F.2d, 195 (9th Cir. 1976).

II. THE OPINIONS BELOW ALLOWED THE GOVERNMENT TO INTRODUCE A "BOX" OF CONTESTED DOCUMENTS WITHOUT ANY FOUNDATION, IDENTIFICATION OR AUTHENTICATION AND DENIES PETITIONER HIS RIGHT TO CONFRONT THE EVIDENCE AND WITNESSES AGAINST HIM.

The Court's decision seemingly sets a new rule in the Tenth Circuit as well as all the other Circuits for the introduction of contested evidence (or a box of contested evidence). Not one person identified the papers therein as records of B.P.M.; no custodian was called. F.B.I. Agent Blount testified near the completion of the Government's case that this was "a" box of records received from William Lambert. F.B.I. Agent Brechwald testified that he examined the records in the box, purely from a scheduling point of view as an accountant, but that he didn't know what, or whose records they were. NOT ONE witness with knowledge of the box was even

shown the box in court. Jack Clothier and William Lambert, who controlled the "box" for almost a year, were not called by the Government to testify at the first trial. The Government simply was allowed at the end of the Government's case to have Agent Blount testify that he picked up the "box" from Lambert, and the box was admitted. Thereafter, Agent Brechwald was then allowed to testify that he prepared schedules from them. Not one person identified the box as containing B.P.M. records. The **real** issue here is CONFRONTATION! It is no accident that every person who would have had to be called by the Government to prove chain of custody or to identify or authenticate the evidence, or that every person who had possession of the box and thus an opportunity for alteration or blackmail, was involved with each other in a scheme to defraud the Defendant and thus guilty of criminal conduct themselves. Yet the Defendant had no opportunity to question **anyone** as to what they knew about the Government Exhibit 53, or its relation to the Defendant. Every one of the persons who had possession of the records had a reason to lie about why or what records he had. The Defendant's denial of confrontation was aggravated by the rebuttal argument of the Government. They did not argue that they might be, they argued that they were "the" records (TR I 3325). It is the motive and involvement of the persons who would have had to have been called by the Government to lay the foundation for identification and then authenticate the box that elevates this issue from one of mere evidentiary discretion to a question of constitutionally required confrontation. See *Davis v. Alaska*, supra at 110; *Ohio v. Roberts*, 100 S.Ct. 253 at 1537 (1980); *Green v. McElroy*, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413; 3 L.Ed.2d 1377 (1959).

The Government, in its final arguments, and the Court, on the record, contended that the contents of the box was relevant to **both** Counts XVI and XVII. In response to defense counsel's objections to the jury delving into the box during its deliberations, the trial judge stated, as additional grounds for denial, ". . . that the position of the Government, and I think it's well founded, that the contents of the box would indicate the possibility of motive or intent in connection with the remaining **Counts XVI and XVII.**" (TR I 3390) (Emphasis added.) Hence the introduction of the box as evidence is, in addition to a denial of the Defendant's right to confrontation, an erroneous introduction of highly prejudicial evidence used in a destructive manner and not merely harmless error, as it related to his conviction on Counts XVI and XVII in the first trial. The key issues of confrontation are that the Government intentionally, by its strategy, denied Defendant confrontation on the issues surrounding the "box," and moreover denied the Defendant's right to confront the **hearsay** context of those records in the box; in contravention of Federal Rule of Evidence 803 (6). The Government then argued the contents of those hearsay records to the jury for the truthfulness of the hearsay information contained therein.

III. PREVENTING THE DEFENDANT FROM INFORMING THE JURY THAT HE WAS ACQUITTED OF OTHER CRIMES, EVIDENCE OF WHICH WAS INTRODUCED AT BOTH TRIALS AND ARGUED TO THE JURY, EMASCULATED THE DEFENDANT'S CONSTITUTIONAL PROTECTIONS OF COLLATERAL ESTOPPEL, DOUBLE JEOPARDY, CONFRONTATION, DUE PROCESS AND A FAIR AND IMPARTIAL JURY.

The Government can strike hard blows, but not foul

ones, *Berger v. U.S.*, 295 U.S. 78 (1978). The Court of Appeal's decision allows the Government to do just that. At the first trial after the Defendant's acquittal by the trial court on a motion for a Judgment of Acquittal (which was affirmed by this Circuit, sitting *en banc*) the court informed the jury that counts I-XV had been "otherwise disposed of." The Defendant requested a severance and/or a mistrial of Counts XVI and XVII and further argued that since the Government had the opportunity to prove what was now "other crimes" of the Defendant, the Defendant should be allowed at trial to assert the acquittal. The trial court prohibited the Defendant from doing so and the Court of Appeal's decision fails to even address this issue as it arose in the second trial.

At the second trial on Count XV the Government was again allowed to introduce evidence of counts I-XV to prove motive of the Defendant under authority of F.R.E., 404 (b), despite its inherently prejudicial effect. Again, defense counsel was prevented from informing the jury of the judgment of acquittal in order to rebutt motive. When the Defendant took the stand at the second trial, the Government was allowed to confront the Defendant with evidence of these other crimes and cross-examine him thereon to prove motive. Yet, despite the fact that the Government made the decision to open this door, the Defendant was prohibited from telling the jury that he had been acquitted in that same court of committing those acts in an attempt to rebutt motive. The trial court specifically and emphatically warned the Government not to mention the other crimes in closing at both trials (TR I 3221) (TR II 1210) with which the government agreed (TR II 1210). Yet the prosecutor, Hardy, minutes later stood in front of the jury and argued:

> "And I suggest to you that the evidence that the Government presented proves that the reason that he didn't want the Energy Department auditors to find out that he was selling things that he wasn't buying, that it was wrong, it **was against the law** and he wanted the records destroyed." (TR II 1245) (Emphasis added.)

It is fundamentally unfair and unconscionable to construe our system of justice and the United States Constitution so as to allow the Government to introduce evidence of other crimes on the part of the Defendant at both trials (not to cast aspersions upon the character of the Defendant) to prove MOTIVE when the Defendant has already been acquitted in the same court of those crimes and then hold that the Defendant's acquittal of those crimes is irrelevant and hearsay. Why is evidence regarding proof of other crimes when offered by the Government relevant to prove motive and irrelevant when the Defendant tries to prove that there was no motive? How can a verdict of conviction in any court NOT BE hearsay when offered by the Government to prove motive, and a Judgment of Acquittal by the same court conducting that same trial upon the same evidence when offered by the defense to rebutt that motive BE hearsay? The Court of Appeal's decision holds this.

A similar situation was encountered in *U.S. v. Phillips*, 401 F.2d 301 at 306 (7th Cir. 1968), but the Second Circuit Court of Appeals reached the opposite conclusion.

In the present case the result is clear. The Petitioner at both trials was denied his constitutional rights of collateral estoppel, double jeopardy, due process, confrontation and a fair and impartial jury.

IV. THE OPINIONS BELOW ALLOW A DOUBLE STANDARD TO BE APPLIED IN THE GRANTING OF CHALLENGES FOR CAUSE, THUS INCREASING THE GOVERNMENT'S PRE-EMPTORY CHALLENGES.

At the second trial, many prospective jurors had some knowledge of the prior proceedings including the granting of the Petitioner's motion for judgment of acquittal on Counts I-XV. In *voir dire*, when a prospective juror had some knowledge of the prior proceeding, (**but not** the acquittal) the Court, over the Petitioner's objection, would attempt to rehabilitate the juror by examining the juror to determine whether he or she could put aside their knowledge and serve as a fair and impartial juror. This occurred even when the prospective juror had **inaccurate** or **confused** information regarding the previous proceedings. However, when a prospective juror had accurate knowledge of the prior proceedings, (**specifically** the acquittals) the Court, on **every** occasion, granted the Government's challenge for cause and specifically refused to even ask the prospective juror whether he or she could be fair and impartial.

This Court has stated that knowledge of a case or prior proceedings is not sufficient grounds for removal of a juror from the jury panel, *Irwin v. Dowd*, 366 U.S. 787, 81 S.Ct. 1639, 6 L.Ed. 751 (1961). It is incumbent upon the trial court to inquire as to whether jurors, because of their knowledge, have formed any opinion that they could not yield to the **evidence.** While it is true that the trial judge has great discretion in the *voir dire* process, it is also true that this process must be conducted in an even-handed way; and where this discretion is abused reversal may be required. *United States v. Rucker*, 557 F.2d 1046 (4th Cir. 1977).

The Court of Appeal's decision fails to address the central issue of Defendant's objections. The trial court did not apply the proper standards enumerated by this Court, in *Irwin v. Dowd*, (36 U.S. 787, 81 S.Ct. 1639, 6 L.Ed. 751 [1961]), to those jurors challenged for cause by the Government, while applying these standards to those challenged by the defense, to those prospective jurors with knowledge of the prior proceedings. Contrary to the Court of Appeal's rationale, the trial judge made no decisions based on "demeanor of the jurors" but stridently applied an arbitrary standard that he himself questioned. The trial court stated:

> "There is some question in my mind the fact that someone has read that for some reason charges were dismissed, that that in and of itself disqualifies them. But that's the standard I have been using and I propose to continue it, but . . . ." (TR II 126)

Particularly with regard to Jurors Meisenheimer (TR II 43), Sherwood (TR II 156), Smith (TR II 174), Terhune (TR II 177), Smith (TR II 192), Cook (TR II 204), McFerrin (TR II 234), Tripp (TR II 273), and Aydelott (TR II 285) (where the Petitioner specifically had objected to the Court's standard and asked for a mistrial) the Court failed to even inquire whether they had formed an opinion from this knowledge, much less whether they could set it aside. Conversely, the trial judge extensively questioned jurors who had unfavorable and inaccurate knowledge about the prior proceedings and who the Petitioner challenged for cause. This procedure was particularly prejudicial after Petitioner had exercised their last pre-emptory challenge.[3]

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[3] It is clear that this process impaired the right of the defense to its use of peremptory challenges to the prejudice of the defendant The defense was bound to use its last two challenges on persons with incor-

It is not surprising that the Court often "questioned its own standard" throughout the entire *voir dire* procedure. (TR II 126, 161, 182) The standard was wrong and lacked any foundation in law, which resulted in the denial of due process to Petitioner, as one-by-one, qualified jurors were dismissed at the Government's request for "cause." The Petitioner's right to a fair selection process and **full and equal** use of pre-emptory challenges requries **more** than a "questionable" standard which resulted in a "questionable" trial. As the Supreme Court in *Pointer v. United States*, 14 S.Ct. 410 (1894) points out:

> "Any system for the impanelling of a jury that prevents or embarrasses the full unrestricted exercise by the accused of that right must be condemned." *Pointer*, supra at 414.

The Trial Court's action severely impaired the Defendant's rights to fairly utilize its pre-emptory challenges and requires reversal. See *Lewis v. United States*, 146 U.S. 730, 13 S.Ct. 136, 138; 36 L.Ed. 1011 (1882); *Swain v. State of Alabama*, 380 U.S. 24, 85 S.Ct. 783 (1965).

V. THE OPINIONS BELOW FAIL TO APPLY THE INDEPENDENT EVIDENCE TEST FOR INTRODUCTION OF CO-CONSPIRATORS' STATEMENTS WHEN THE ONLY OTHER INDEPENDENT EVIDENCE NEGATED THE INTENT OF THE ONLY OTHER ALLEGED CO-CONSPIRATOR IN VIOLATION OF PETITIONER'S RIGHT TO CONFRONTATION.

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rect knowledge of the prior proceedings and charges (Tr. II-260), leaving none remaining to challenge Jurors Bell and Delk, both of whom the defense objected to for cause. Concurrently, with this, the Court excused prospective Jurors Carl Tripp (TR II 277) and Jimmy Aydelott (TR II 287) for cause on motion by the Government without any evidence of their partiality, based purely on correct knowledge of the prior proceedings.

The Court of Appeal's decision allows the Government to completely avoid the law of this circuit as provided for in *United States v. Stipe*, 653 F.2d 446 (10th Cir. 1981) as well as other Circuits (see also, *U.S. v. James*, 590 F.2d 575 [5th Cir. 1979]) and thus violated the Defendant's constitutional right to confrontation. The only alleged "independent evidence" of the alleged conspiracy between the Defendant and Carlos Marcello was portions of the tape recorded conversation between them on January 29, 1980. This was firmly established in the "James-Peterson-Stipe" pre-trial hearing (April 1, 2, 5 and 6 of 1983.

In the present case, the Court of Appeal's decision allows the tape recorded conversations between the only two alleged conspirators to serve as **the** necessary "independent evidence" to prove the existence of the conspiracy in order to introduce those same conversations. (*U.S. v. Stipe*, supra, at 448) In *Stipe* the trial court listened to the tapes sought to be introduced and **rejected** them as the "independent evidence" necessary to establish the conspiracy. Further, because it is impossible to cross-examine a tape recording, the Defendant was denied the right of confrontation of the words of Marcello on the January 29th tape. Further, the Government argued in their Court of Appeal Brief that the jury could determine the conspiratorial agreement by listening "directly to Marcello's words." The Government's position is contrary to the case precedent in all Circuits. Affirmance of this error would place the Tenth Circuit in the position of being uniquely alone in permitting a co-conspirator's non-confrontable statements to be used to establish the alleged conspiracy. The independent evidence requirement would thereafter be a nullity. This would be a quantum leap backwards, and would re-institute the

"bootstrapping evil" condemned by *James-Peterson-Stipe* and their progeny in all Circuits.[4]

This error is further aggravated by the fact that the other independent evidence available completely negated any intent on the part of Marcello to conspire to obstruct (rather than serving as the requisite independent evidence proving the conspiracy). More specifically, the Court of Appeal's decision upholds the refusal of the Defendant's Federal Rule of Criminal Procedure 29 motion for acquittal under the theory of "implied consent" of Marcello because he listened to the Defendant's statements. The Court of Appeal's opinion states at page 8:

> ". . . Defendant's own statements on tape that he wanted Marcello to prevent Lambert and Clothier from going to the F.B.I. were not hearsay. Fed. R. Evid. 801(d)(2)(A). Those statements implicitly agreeing to comply with Defendant's request constituted substantial independent evidence of a conspiracy between Defendant and Marcello." (Emphasis added.)

In the entire trial and the pre-trial hearing on the admissability of alleged co-conspirators' statements, the only proof of any affirmative thing that Marcello ever did was call his attorney in Lafayette to get information on the people Sutton was accusing of blackmailing him. Every conversation that Marcello had about Sutton out of Sutton's

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[4] The trial court did not give any instruction when the tape was introduced. The instruction given prior to deliberations makes no mention of the requirement of "independent evidence." *U.S. v. Rios*, 611 F.2d 1335 (10th Cir. 1979), The Tenth Circuit found error in the failure to properly instruct the jury and held that the reason for the instruction "was the concern that without it, declarations would bootstrap themselves and be used as proof of the existence of the conspiracy and of the Defendant's involvement in it when independent proof of these factors was a prerequisite to the use of the co-conspirator's statements." *Rios*, supra, 1340.

presence shows a scheme by Marcello to get money from Sutton for himself or Barry Mouton or had to do with taking over the B.P.M. corporation. The Government-recorded conversation occurring February 1, 1980, between Carlos Marcello and his attorney, Barry Mouton, explicitly shows Marcello's intent:

> "BARRY MOUTON: If he ain't worried about nothin' then he don't need nobody.
> "CARLOS MARCELLO: I'm tellin' ya. He, but he think that I can do this. **I ain't gonna do nothin like that.**" (Emphasis added.)

It is clear that the Government failed to prove beyond a reasonable doubt that Marcello had the necessary specific intent to conspire to obstruct justice, even at the time of the January 29, 1980 meeting with Sutton. It was incumbent upon the Government to prove beyond a reasonable doubt that **Carlos Marcello** entered into agreement with Robert Sutton where he, Carlos Marcello, had a specific intent to conspire to obstruct justice. See *United States v. Butler*, 494 F.2d 1246 (10th Cir. 1974); *United States v. Moss*, 591 F.2d 428 (8th Cir. 1979); *United States v. Phillips*, 630 F.2d 1138 (6th Cir. 1980); *United States v. Melchor-Lopez*, 627 F.2d 886, 890 (9th Cir. 1980). A conspiracy conviction requires proof, beyond a reasonable doubt, that at least two persons conspired to commit a crime. One cannot conspire with himself. *Ronantino v. United States*, 400 F.2d 618 (10th Cir. 1968); *United States v. Peterson*, 488 F.2d (5th Cir. 1974); *United States v. Moss*, supra.

CONCLUSION

For the foregoing reasons, this Honorable Court should issue a Writ of Certiorari to review the conviction of the Petitioner in this case and, after consideration on the merit, vacate and set aside the conviction of Petitioner.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I, Mitchell B. Lansden, Attorney of Record for the Petitioner and a Member of the Bar of the United States Supreme Court, on application, certify that I have served by United States Mail three copies of the foregoing Petition for a Writ of Certiorari and the annexed Appendix upon the Solicitor General of the United States, first class postage prepaid, by addressing an envelope containing same to him at his official address and posting same at the United States Post Office, Main Branch, Florida Street, Baton Rouge, Louisiana, this _____ day of August, 1984.

All parties required to be served have been served.

MITCHELL B. LANSDEN
Attorney at Law